Penghuni-Penghuni Premis Tersebut v Eugene a/l AF Decruz & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-316 OF 1994
NH CHAN, SITI NORMA YAAKOB JJCA AND KC VOHRAH J
13 FEBRUARY 1998

Land Law *— Possession — Recovery of — Failure by vendor to deliver vacant possession — Unknown occupiers refused to vacate premises — Occupiers without licence or consent — Whether plaintiffs' application complied fully with procedural requirements on service — Whether competent for judge to make order for vacant possession — Rules of the High Court 1980 O 89*

The plaintiffs purchased a house from one Baskaran a/l Govindan in 1991. About two years after the purchase of the property, the plaintiffs were registered as proprietors of the land on which the house stands. Notwithstanding the plaintiffs' request, Baskaran failed to deliver vacant possession of the house as agreed in the sale and purchase agreement and he continued to illegally occupy the house until he died on 19 January 1994. Before Baskaran passed away, the plaintiffs issued a summons in the magistrate's court for vacant possession of the house. The plaintiffs attempted to take possession of the house after Baskaran's death. However, Baskaran's son Mohan, who did not live there, refused to allow them entry into the house. At that time, there were two unknown persons at the premises. There was another attempt to take possession of the house but four unknown persons staying in the house refused to leave the premises. It was averred in the plaintiffs' affidavit that the unknown individuals who occupied the premises had entered and occupied the premises without licence or consent.

The judicial commissioner ruled that the sole affidavit filed in opposition to the plaintiffs' affidavit, the affidavit of one B Kumaran a/l Baskaran, was inadmissible. He then ordered the defendants to deliver vacant possession to the plaintiffs within six months. The defendants appealed against this decision, arguing that there was evidence that they were tenants of the premises.

Held, dismissing the appeal:
The plaintiffs' affidavit in support of their application clearly shows that they were and are lawful owners of the material land with the building built thereon. The affidavit further shows that both the plaintiffs are legal owners of the land by virtue of sale and purchase agreement dated 6 January 1991. There is nothing to justify the drawing of an inference that any of the defendants was a tenant, either at the time of the plaintiffs' application for vacant possession or as a tenant holding over after the termination of any form of

tenancy. This is more so, when there was no affidavit from any of the said defendants to show otherwise. Therefore, substantively, the plaintiffs' application was in order. The judicial commissioner had carefully considered O 89 of the Rules of the High Court 1980 and the affidavit of the plaintiffs and concluded that the plaintiffs' application complied fully with the procedural requirements on service under O 89 of the RHC. It was, therefore, competent for him to have made the order for vacant possession (see pp 631G–I and 632A).

[Bahasa Malaysia summary

Plaintif-plaintif telah membeli sebuah rumah daripada seorang bernama Baskaran a/l Govindan pada tahun 1991. Lebih kurang dua tahun selepas membeli harta tersebut, plaintif-plaintif didaftarkan sebagai tuan punya tanah di mana rumah itu didirikan. Tanpa menpedulikan permintaan plaintif-plaintif, Baskaran gagal menghantar-serah milikan kosong rumah itu seperti yang disetujui dalam perjanjian jual beli dan dia terus menduduki rumah itu menyalahi undang-undang sehingga kematiannya pada 19 Januari 1994. Sebelum Baskaran meninggal, plaintif-plaintif telah mengeluarkan satu saman di mahkamah majistret untuk milikan kosong rumah itu. Plaintif-plaintif cuba mengambil pemilikan selepas kematian Baskaran. Walau bagaimanapun, anak lelaki Baskaran iaitu Mohan, yang tidak tinggal di sana, enggan membenarkan mereka memasuki rumah itu. Pada masa itu, dua orang yang tidak dikenali berada di premis itu. Satu lagi percubaan dibuat untuk mengambil pemilikan ke atas rumah itu tetapi empat orang yang tidak dikenali yang tinggal di dalam rumah itu enggan meninggalkan premis tersebut. Ia ditegaskan dalam afidavit plaintif-plaintif bahawa individu yang menduduki premis tersebut telah masuk dan mendudukinya tanpa lesen atau izin.

Pesuruhjaya kehakiman memutuskan bahawa satu-satunya afidavit yang difailkan bagi menentang afidavit plaintif-plaintif, iaitu afidavit seorang yang bernama B Kumaran a/l Baskaran, tidak boleh diterima. Beliau kemudiannya memerintah defendan-defendan supaya menghantar-serah milikan kosong kepada plaintif-plaintif dalam tempoh enam bulan. Defendan-defendan merayu terhadap keputusan ini, dengan menghujahkan bahawa terdapat keterangan bahawa mereka adalah penyewa premis tersebut.

Diputuskan, menolak rayuan:
Afidavit menyokong permohonan plaintif-plaintif jelas menunjukkan bahawa mereka adalah pemilik sah tanah berkenaan dengan bangunan yang didirikan atasnya. Afidavit seterusnya menunjukkan bahawa kedua-dua plaintif merupakan pemilik sah tanah itu disebabkan perjanjian jual beli bertarikh 6 Januari 1991. Tiada apa-apa untuk

memberi justifikasi kepada inferens bahawa mana-mana defendan adalah penyewa, sama ada ketika permohonan plaintif-plaintif untuk milikan kosong ataupun sebagai penyewa yang memegang lepas masa selepas penamatan sebarang bentuk penyewaan. Lebih-lebih lagi, apabila tiada afidavit daripada mana-mana defendan untuk menunjukkan sebaliknya. Dengan itu, dari segi substantif, permohonan plaintif-plaintif adalah teratur. Pesuruhjaya kehakiman telah mempertimbangkan A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan afidavit plaintif-plaintif secara berhati-hati dan membuat kesimpulan bahawa permohonan plaintif-plaintif telah mematuhi dengan sepenuhnya kehendak prosedur berhubung dengan penyampaian di bawah A 89 KMT. Maka, adalah kompeten untuk hakim membuat perintah milikan kosong (lihat ms 631G–I dan 632A).]

Notes

For cases on recovery of possession, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 2188.

Legislation referred to

Rules of the High Court 1980 O 89

Appeal from: Originating Summons No S2–24–592 of 1994 (High Court, Kuala Lumpur)

M Kayveas (*Blanche Kayveas & Co*) for the appellant.
T Ramadas (*Siva Ram & Associates*) for the respondents.

KC Vohrah J (delivering judgment of the court): In 1991, Eugene a/l AF Decruz and his daughter ('the plaintiffs') purchased a house from Baskaran a/l Govindan, so they narrated in their affidavit. Again, from the affidavit filed in support of their O 89 of the Rules of the High Court 1980 ('the RHC') application, the following have been disclosed. About two years after the purchase of the property, on 2 April 1993, the plaintiffs were registered as proprietors of the land (HS(M) 7341, No PT 12584, Batu 7, Jalan Batu Caves) on which the house stands.

Notwithstanding the plaintiffs' request, Baskaran failed to deliver vacant possession of the house as agreed in the sale and purchase agreement and the man continued to illegally occupy the house until he died on 19 January 1994. Before Baskaran passed away, the plaintiffs issued a summons in the magistrate's court in Rawang for vacant possession of the house. That summons and Baskaran's counter-claim have since been struck out.

The plaintiffs attempted to take possession of the house after Baskaran's death. However, Baskaran's son Mohan, who did not live there, refused to allow them entry into the house. At that time, there were two unknown

A persons at the premises. A police report was made on the incident and on 16 April 1994 with police protection, there was another attempt to take possession of the house but four unknown persons staying in the house, three of whom probably immigrants, refused to leave the premises. It was averred in the affidavit that the unknown individuals who occupied the premises had entered and occupied the premises without licence or consent.

B

When the matter came up for hearing before Abdul Kadir Musa JC (as he then was) on 20 September 1994, he ruled that the sole affidavit filed in opposition to the plaintiffs' affidavit, the affidavit of one B Kumaran a/l Baskaran, was inadmissible. The learned judicial commissioner then ordered the defendants to deliver vacant possession to the plaintiffs within six months.

C

Although the defendants appealed against the whole of the decision of the learned judicial commissioner, before us, counsel for the appellants, Dato' Kayveas, abandoned the appeal against the rejection of B Kumaran's affidavit by the learned judicial commissioner. He instead argued that there was evidence that the defendants were tenants of the premises, presumably meaning that they were tenants holding over. Dato' Kayveas made reference to two documents for his sole ground of appeal, one to para 5 of a solicitor's letter (found at p 114 of the appeal record) and the other to a purported tenancy agreement (found at p 88 of the appeal record) that the defendants were tenants of the late Baskaran. But both these documents are exhibits referred to in the affidavit of B Kumaran which had been ruled inadmissible by the learned judicial commissioner and we fail to see how he could seek to rely on these exhibits.

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E

In the court below, Abdul Kadir Musa JC had only the affidavit of the plaintiffs supporting the O 89 of the RHC application when he ordered vacant possession of the premises. In his written judgment, the learned judicial commissioner considered various enclosures in the file pertaining to the case and concluded that the plaintiffs' application complied fully with the procedural requirements on service under O 89 of the RHC and he went on to state:

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> Having so concluded, I am left only to ascertain whether or not the substantive part of the plaintiffs' application satisfied r 1 of the said order. Close perusal of the plaintiffs' affidavit in support of their application (encl (2)) clearly shows that they were and are lawful owners of the material land with the building built thereon as reflected by paras (1) to (3) of the said enclosure. Exhibit 'A' to encl (2) shows that both the plaintiffs are legal owners of the land by virtue of sale and purchase agreement dated 6 January 1991 exhibited as 'B' to the same. I cannot find anything to justify me to conclude or draw any inference that any of the defendants was a tenant, either at the time of the plaintiffs' application for vacant possession or as a tenant holding over after the termination of any form of tenancy. This is more so, when there was no affidavit from any of the said defendants to show me otherwise. Thus I held that substantively the plaintiffs' application was in order ... .

H

I

Quite clearly, the learned judicial commissioner had carefully considered O 89 of the RHC and the affidavit of the plaintiffs and it was competent

for him to have made the order for vacant possession. We accordingly dismissed the appeal with costs and ordered the deposit in this appeal to go to the respondent to account of taxed costs.

Appeal dismissed.

Reported by David Lai